



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 10 OF 2020

IN THE MATTER OF AN APPLICATION BY HON BUTIYA NICKSON WILSON ISIJI

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS OF THE PETITIONER UNDER ARTICLES 27, 41, 47 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF THE IMPEACHMENT OF THE PETITIONER FROM THE POSITION OF DEPUTY SPEAKER

BETWEEN

HON. BUTIYA NICKSON WILSON ISIJI.....PETITIONER

VERSUS

SPEAKER, COUNTY ASSEMBLY OF VIHIGA.....1st RESPONDENT

COUNTY ASSEMBLY OF VIHIGA.....2nd RESPONDENT

CLERK, COUNTY ASSEMBLY OF VIHIGA.....3rd RESPONDENT

JUDGMENT

1. Hon Butiya Nickson Wilson Isiji (the Petitioner) was elected as the Deputy Speaker, County Assembly of Vihiga, on a date that was not disclosed.
2. On or around 17 March 2020, the Chairperson of the Budget and Appropriation Committee of the County Assembly of Vihiga gave a notice of motion for the Petitioner's removal from the office of Deputy Speaker.
3. The grounds for the motion were that the Petitioner had acted contrary to the provisions of Standing Order 159 of the County Assembly of Vihiga Standing Orders; abuse of office contrary to the provisions of the Anti-Corruption and Economic Crimes Act and the provisions of the Public Officers Ethics Act, and lack of impartiality/incompetence.
4. The Motion was to come up for debate before the County Assembly on 19 March 2020.
5. On the same day, the Petitioner filed a Petition alleging that the proceedings violated his rights to natural justice and fair administrative action as well as the Standing Orders.
6. Filed at the same time was a Motion under a certificate of urgency seeking interim conservatory orders.
7. The Court did not grant any interim relief, and the County Assembly moved to debate and passed the Motion, removing the Petitioner from the Deputy Speaker's office.
8. On 14 September 2020, the Petitioner filed an Amended Petition seeking orders:

(i) A declaration that the action and/or decision of the 1st and 2nd Respondents not to summon the Petitioner to respond to the allegations on the impeachment motion on the floor of the 2nd Respondent before the same could be subjected to a debate and voting was unconstitutional, and it violated the constitutional rights of the Petitioner under Articles 27, 28, 41, 47 and 50 of the Constitution of Kenya as read with the Standing Orders Nos 65 and 70 of the 2nd Respondent's and the same is null and void.

(ii) An order for compensation of 12 months' salary and allowances attaching to the office of Deputy Speaker as at the date of removal of the Petitioner from office plus interest thereon at court rates until payment in full.

(iii) Costs of the Petition and interest thereon at court rates until payment in full be provided for.

9. The Respondent's filed Grounds of Opposition on 17 September 2020.

10. On 28 September 2020, the Petitioner filed a Notice to withdraw the Motion. The Court adopted the notice.

11. The parties appeared before this Court for directions on 26 November 2020, and directions were duly given.

12. Pursuant to the directions, the following were filed:

(i) Replying affidavit of the Clerk of the County Assembly on 17 December 2020.

(ii) Submissions and a further affidavit by the Petitioner on 29 January 2021.

(iii) Submissions by the Respondents on 15 February 2021.

13. The Petitioner raised 3 Issues in his submissions:

(i) Whether the Respondents' replying affidavit sworn on 16/12/2020 is fatally incompetent for offending Section 5 of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya?

(ii) Whether the removal of the Petitioner from the office of the Deputy Speaker County Assembly of Vihiga on 19/3/2020 was lawful and/or violated his fundamental rights and freedoms?

(iii) Whether the Petitioner is entitled to the prayers sought?

14. The Respondents made submissions on the basis of issues as identified by the Petitioner.

Fatally incompetent affidavit

15. The Petitioner challenged the competence of the replying affidavit sworn by the Clerk of the County Assembly on the ground that it was sworn in Vihiga while the stamp of the Commissioner of Oaths who commissioned the affidavit indicated that he was based in Kisumu.

16. The anomaly, the Petitioner urged, was fatal as it was contrary to the mandatory requirements of section 5 of the Oaths and Statutory Declarations Act. The case of *Edwin K. Too v Paul K. Sitienei* (2018) eKLR was cited.

17. The Respondents took the view that the replying affidavit was proper because the postal address of a Commissioner of Oaths was not the decisive factor to the validity of an affidavit.

18. In any case, the Respondents argued, such discrepancy was not fatal as it did not go to the root or substance of the affidavit.

19. The Respondents drew the attention of the Court to the case of *Peeraj General Trading & Contracting Co Ltd, Kenya & Ar v Mumias Sugar Co Ltd* (2018) eKLR.

20. The Court has considered the cited cases and has come to view that in the present circumstances, the material placed before the Court to challenge the competency of the affidavit is not sufficient.

21. Not sufficient because it would have required an interrogation of the deponent and the Commissioner of Oaths to disclose the circumstances under which a seal with a Kisumu postal address was used. It is also a possibility that the Commissioner of Oaths could as well have travelled and commissioned the affidavit in Vihiga.

22. The Court finds that the anomaly is not fatal.

Lawful removal from office of Deputy Speaker

23. The Petitioner primarily relied on Standing Order 70(2) to contend that the process to remove him from office offended his right to fair administrative action and natural justice.

24. The Standing Order requires that the subject of removal be furnished with all supporting documentation 3 clear days before the debate of a removal motion. In his case, the Petitioner asserted that notice was given on 17 March 2020 and debate was conducted on 19 March 2020.

25. The Respondents asserted on their part that the removal of the Petitioner was lawful as the notice of removal was lodged with the Clerk on 17 March 2020, it had the requisite support of at least a third of the members, the House Business Committee scheduled the motion for debate in a meeting attended by the Petitioner, the Petitioner was served with a copy of the motion at the said House Business Committee meeting, the Petitioner failed to file any written response and lastly that the Petitioner was afforded two opportunities at the plenary of the Assembly, but he declined to make any representations.

26. The Respondents also urged that Standing Order 70 did not apply to the position of Deputy Speaker. In the view of the Respondents, the removal process of the Deputy Speaker was solely governed by Standing Order 65.

27. The Court has looked at the Standing Orders of the County Assembly of Vihiga. Standing Orders 65 and 70 appear under Part XIII *Procedure on Removal from Office*.

28. In the Court's considered view, the removal of the Governor, the Deputy Governor, the Speaker, the Deputy Speaker and County Executive Committee members are all subject to Standing Order 70.

29. The Standing order gives added protection to the Deputy Speaker, (or any other of those listed) in addition to the protections in Standing Order 65.

30. In the present case, the Petitioner did not demonstrate that there existed documents that should have been supplied to him or which the County Assembly declined to supply to him. There was also no evidence that a Select Committee was involved.

31. The Hansard of the proceedings of 19 March 2020 indicated that the Petitioner was present during the plenary and was called upon by the Speaker to respond to the allegations. In his representations, the *Petitioner objected to the proceedings on the ground of sub judice* and indicated that he would not respond to the substantive allegations.

32. The Court, on the basis of the material placed before it, is satisfied that the Petitioner was informed of the removal motion and was afforded an opportunity to make representations before the County Assembly but snubbed the opportunity.

33. The Petitioner raised an issue concerning his and a colleagues attendance at the House Business Committee meeting on 18 March 2020. Without interrogation and/or other forensic evidence, the Court cannot tell whether the Hansard recording the Petitioner as having been present was altered or forged.

Conclusion and Orders

34. From the foregoing, the Court finds no merit in the Petition, and it is dismissed.

35. Since the Petitioner is still a member of the County Assembly, the Court orders that each party bears its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 10TH DAY OF MARCH 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner ROW Advocates LLP

For Respondents Rakewa Otieno Francis, Principal Legal Counsel

Court Assistant Chrispo Aura